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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 426

STATE OF OHIO EX REL., VAAD HACHINUCH HACHAREDI (TRADITIONAL EDUCATIONAL COUNCIL),
Appellant,

VS.

EDWIN C. BAXTER, WM. C. DUNLAP, SAMUEL E. KRAMER, FRED A. PEASE AND NORMAN KRICHBAUM, AS MEMBERS OF THE CITY PLANNING COMMISSION OF THE CITY OF CLEVELAND HEIGHTS, OHIO,
Appellees.

STATEMENT AS TO JURISDICTION

Pursuant to paragraph 1 of Rule 12 of this Court, appellant presents the following statement as to the basis upon which this Court has jurisdiction upon appeal to review the judgment of the Supreme Court of Ohio involved herein:

A. Statutory Provisions Sustaining Jurisdiction

This is an appeal by Vaad Hachinuch Hacharedi (hereinafter referred to as appellant) under Section 237(a) of the Judicial Code, U.S.C.A., Title 28, Section 344 (as amended by the Act of February 13, 1925, ch. 229, Section

1, 43 Stat. 936) and under the Act of January 31, 1928, ch. 14, 45 Stat. 54, and the Act of April 26, 1928, ch. 440, 45 Stat. 466, from a final judgment in a suit in the highest court of the State, to-wit, the Supreme Court of the State of Ohio, in which suit there was drawn in question the validity of a certain order, legislative in character, of the Planning Commission of the City of Cleveland Heights, Ohio, on the ground that said order was repugnant to the Constitution of the United States, particularly the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, providing, in part, that no State shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

B. Order of Planning Commission of Cleveland Heights, Ohio, Validity of Which Is Involved

The order of the Planning Commission of Cleveland Heights, Ohio, was an order made and entered on October 24, 1945 denying to appellant the use of its property at 14298 Superior Road, Cleveland Heights, Ohio, for school purposes (R. 41-42).

Said Planning Commission is a commission created under Chapter III of The Revised Ordinances of the City of Cleveland Heights enacted pursuant to the provisions of Section 4366-1 to 4366-12, both inclusive, of the Ohio General Code (Throckmorton's Annotated Code of Ohio, Baldwin's Certified Revision of 1945). The pertinent provisions of which may be summarized as follows: the Planning Commission is authorized to divide the municipality into zones, in the interest of public health, safety, convenience, comfort, prosperity or general welfare, for the limitation and regulation of the use of structures and premises in such zones.

Said Planning Commission, in making its said order,

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acted under Chapter III of The Revised Ordinances of The City of Cleveland Heights, Ohio, enacted pursuant to the provisions of Sections 4366-1 to 4366-12, both inclusive, of the Ohio General Code.

C. Date of Judgment and Date of Application for Appeal

The judgment sought to be reviewed was made and entered on the 2nd day of July, 1947.

The Petition for Appeal was presented by appellant and filed on September 26, 1947.

D. Nature of Case and Rulings of Court Showing Case Is Within Jurisdictional Provisions Relied On

The hearing before the Planning Commission was instituted by appellant by a written application for a permit to use its premises for a school.

After the hearing the Planning Commission issued its order denying such permit to appellant.

Following such denial appellant instituted proceedings in Mandamus against the Planning Commission in the Court of Appeals for Cuyahoga County, Ohio. In its petition in said proceedings appellant, specifically and in appropriate detail, drew in question the validity of the Commission's said order on the ground that the same violated the rights of appellant under Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 8).

Said Court of Appeals of Cuyahoga County, on August 12, 1946, by unanimous vote of its three justices, granted appellant's petition and ordered a peremptory writ of mandamus to issue against said Commission directing them to issue a permit authorizing appellant to use its certain property for school purposes.

Thereafter, on August 15, 1946, said Commission filed its Notice of Appeal to the Supreme Court of Ohio, and said

case was reviewed by the Supreme Court of Ohio as a matter of right, the action having originated in a Court of Appeals.

Thereupon, on January 15, 1947, said appeal was argued before said Supreme Court of Ohio, at which time appellant again drew in question the validity of the Commission's said order on the ground that the same violated the rights of appellant under Section 1 of the Fourteenth Amendment to the Constitution of the United States (Appellee's Brief in Supreme Court of Ohio, entire "Argument").

Thereafter, pursuant to order of the Supreme Court of Ohio, said appeal was reargued on April 23, 1947, at which time appellant reiterated its original position wherein it drew in question the validity of the Commission's said order on said Federal constitutional grounds.

Thereupon said Supreme Court of Ohio, on July 2, 1947, by the decision of five of its justices, reversed the judgment of the Court of Appeals and rendered final judgment in favor of the Commission, holding that the Commission was justified in its refusal to issue a permit to appellant to use its property for school purposes. The majority opinion of said Ohio Supreme Court referred to appellant's claim of rights and immunities under the United States Constitution, but did not pass upon the same in any manner.

The minority opinion of the dissenting justices held that the Commission had applied the zoning ordinance in an unreasonable, arbitrary and discriminatory way in that the refusal of the Commission to grant a permit to appellant for a school had no substantial relation to the health, safety, morals or general welfare of the community.

The judgment of the Supreme Court of the State of Ohio entered on July 2, 1947, was a judgment in said suit in the highest court of the State of Ohio in which a decision in said suit could be had, and constitutes a final judgment of

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said court within the meaning of Section 237(a) of the Judicial Code (U.S.C.A., Title 28, Sec. 344).

Whereupon, on September 26, 1947, appellant filed with the Supreme Court of Ohio a petition for appeal to this Court, together with its assignment of errors, in which petition appellant drew in question the validity of said order of the Planning Commission as being repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States. In said assignment of errors appellant charged error in said judgment and decision of said State court in holding and deciding in favor of the validity of the order of the Planning Commission, notwithstanding such order, under color of said state statutes and municipal ordinances, was repugnant to said provision of the Constitution of the United States, and in failing to hold and decide that said order of the Planning Commission constituted a deprivation of appellant's property rights in violation of said provisions of the Constitution of the United States. On September 29, 1947 the Chief Justice of the Supreme Court of the State of Ohio made an order allowing the appeal.

Appellant will urge in this Court each point made in its said assignment of errors.

E. Statement of Grounds upon Which It Is Contended That the Questions Involved Are Substantial

The questions involved go to the very heart of the right of educational institutions to use their property in municipalities where there are in existence zoning ordinances similar to those of Cleveland Heights, Ohio.

In the most concise terms, the contentions of appellant with reference to said questions may be summarized as follows:

1. Ever since the decision of the Supreme Court of the United States in *Village of Euclid* v. *Ambler Realty Co.*,

272 U. S. 365, many municipalities have either enacted or amended zoning ordinances patterned after the ordinance under consideration in that case. This is particularly true of the municipalities in Ohio neighboring the Village of Euclid. Indeed, the zoning ordinance of the City of Cleveland Heights is, with the exception of a few immaterial provisions, identical in words and figures with the Euclid ordinance.

2. The effect of the decision in the *Ambler Realty case, supra,* has been to put the stamp of constitutional validity upon similar ordinances, with the result that municipalities have felt at liberty to apply such ordinances in any manner they see fit, whether or not there is substantially affected the health, safety, morals or general welfare of the community, (e.g., *Village of University Heights* v. *Cleveland Jewish Orphans' Home,* 20 Fed. (2d) 743, Sixth Circuit Court of Appeals.) At the same time, sight has been lost of the fact that this Court, in the *Ambler Realty case, supra,* validated the zoning ordinance in its "general scope" only, specifically qualifying and limiting its ruling in the following language, at page 391:

> "It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises . . . or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable."

3. The order of the Planning Commission, under color of such an ordinance, denies to appellant the equal protection of the laws in that it is not based upon considerations of health, safety, morals or general welfare, but is purely arbitrary and unreasonable. The legalization of such denial would sanction similar arbitrary action by other

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municipalities, there having been no decision by this Court on the questions reserved with the qualifications limited in the *Ambler Realty case* since it was decided by this Court.

4. The order of the Planning Commission, under color of such an ordinance, confiscates appellant's property in that the zoning ordinance specifically provides for the location of schools in single-family residence districts, but at the same time limits and restricts their location therein without any relationship to public health, safety, morals or general welfare. No specific provision for their location in any of the other zone districts is made. The entire matter is left to interpretation by the Law Director of the municipality, as he himself testified (R. 109).

5. Appellant is part of a national organization which is sponsoring schools throughout the country, and the arbitrary action of the Planning Commission of Cleveland Heights prevents it from conducting a school for residents of Cleveland Heights, such prevention having no basis in considerations of public health, safety, morals or general welfare.

The considerations above set forth, particularly the reservations made by this Court in the *Ambler Realty case, supra,* indicate the case is one in which the Federal questions involved are substantial in accordance with the decision of this Court in *Zucht* v. *King,* 260 U. S. 174, 176-77.

F. Stage in Proceedings at Which, and Manner in Which, the Federal Questions Sought to Be Reviewed Were Raised and Way in Which They Were Passed upon by Court.

The Federal questions sought to be reviewed were first raised by appellant in its petition filed in the court of original jurisdiction, i.e., the Court of Appeals of Cuyahoga

County, Ohio, which was the first stage in any legal proceedings which could be instituted by appellant. In said petition appellant set forth, with appropriate particularity and in full detail, that said order of the Planning Commission, under color of said ordinance, and said ordinance as so enforced, were in violation and derogation of the provisions of Section 1, Article XIV of the Amendments to the Constitution of the United States in that thereby relator is deprived of its property without due process of law. Said petition will be a part of the record herein.

In its answer brief, as appellee, before the Supreme Court of Ohio and in its oral argument before said Court on January 15, 1947 and again on reargument ordered by said Court for April 23, 1947, appellant reiterated its contentions under said provisions of the Constitution of the United States.

In its decision of July 2, 1947, the Supreme Court of Ohio took note of said contentions under said provisions of the Constitution of the United States, but failed to pass upon them. The necessary effect of the judgment of the Supreme Court of Ohio is to deny to appellant the Federal rights and immunities so specially claimed by it, which, if recognized and enforced, would require a judgment different from the one rendered which rests upon a ground of local or general law. (*C. B. & Q. Rwy.* v. *Drainage Comm.*, 200 U. S. 561, first syllabus; *West Chicago Railroad* v. *Chicago*, 201 U. S. 506, first syllabus.)

G. Cases Believed to Sustain Jurisdiction

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Zucht v. *King*, 160 U. S. 174, 176;
King Mfg. Co. v. *Augusta*, 277 U. S. 100;
Dahnke-Walker v. *Bondurant*, 257 U. S. 282;

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C. B. & Q. Rwy. v. *Drainage Comm.*, 200 U. S. 561, 580-81;
West Chicago Rrd. v. *Chicago*, 201 U. S. 506, first syllabus;
Fox River Co. v. *R. R. Comm.*, 274 U. S. 651, 653-54;
Hooven & Allison Co. v. *Evatt*, 324 U. S. 652, 659

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237(a) of the Judicial Code, as amended by the Act of February 13, 1925 (ch. 229, 43 Stat. 936, Sec. 1, U. S. C. A., Title 28, Section 344), and under the Act of Jan. 31, 1928, ch. 14, 45 Stat. 54, and the Act of April 26, 1928, ch. 440, 45 Stat. 466.

Respectfully submitted,

GABRIEL LEEB,
Attorney for Appellant.

APPENDIX "A"

Statement of the Case

THE STATE ex rel., VAAD HACHINUCH HACHAREDI, *Appellee,*

vs.

BAXTER et al., CLEVELAND HEIGHTS CITY PLANNING AND ZONING COMMISSION, *Appellants.*

Mandamus—Relator must show refusal to perform act specially enjoined as duty—Municipal zoning commission not required to issue building permit—Authorizing use of residence property for school purposes—Zoning ordinance prohibited such use unless public convenience and welfare served—And appropriate use of neighboring property not substantially and permanently injured.

1. To entitle a relator to a writ of mandamus the evidence must show a refusal to perform an act which the law specially enjoins as a duty resulting from an office, trust or station.

2. In the absence of evidence of an abuse of discretion a writ of mandamus will not be issued to compel a municipal zoning commission to issue a permit to an owner of residence property authorizing its use for school purposes under a valid ordinance prohibiting such use unless in the judgment of the commission the public convenience and welfare will be served and the appropriate use of neighboring property will not be substantially and permanently injured thereby.

(No. 30830—Decided July 2, 1947)

Appeal from the Court of Appeals for Cuyahoga County.

The relator is a corporation not for profit, organized under the laws of this state for the purpose of maintaining institutions of learning for public instruction in both religious and secular subjects.

The five respondents are the members of the planning commission of the city of Cleveland Heights, Ohio.

This action was instituted in the Court of Appeals to obtain a writ of mandamus to compel the respondents to

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issue a permit authorizing the relator to use certain property for school purposes. In its petition the relator alleges that the refusal of the respondents to issue a permit is an abuse of discretion and is violative of the provisions of the federal and state constitutions.

The Court of Appeals held that "no valid excuse or reason exists for not" issuing a permit, and a writ of mandamus was allowed.

Having originated in the Court of Appeals, the case is in this court for review on an appeal as a matter of right.

Mr. Gabriel Leeb, for appellee.

Mr. G. E. Hartshorn, for appellants.

Weygandt, C. J. Does the record disclose evidence tending to show that the respondents were guilty of an abuse of discretion in refusing to issue a permit to the relator to use its residence property for school purposes?

The relator's property is a single family residence located at the southwest corner of Superior and Hampshire roads in the city of Cleveland Heights. The parcel of land has a frontage of 220 feet on the first street and 164 feet on the second.

Under the provisions of the zoning ordinance of that city the property is in a class U-1, or single family, district. The ordinance reads in part as follows:

"Section 4. Single Family House District. • • •

"(a) In a class U-1 district no building shall be used and no building shall be erected which is arranged, intended or designed for a use enumerated in subdivision two (2) of class U-1 uses, unless such dwelling is located:

"(1) On a lot already devoted to a use enumerated in said subdivision, providing said devoted use is not a 'nonconforming' use.

"(2) On a lot fronting on a portion of a street between two intersecting streets in which portion there exists premises devoted to a class U-7 use.

"(3) On a lot immediately adjoining or immediately opposite on the other side of the street from a class U-4 or U-5 district, or

"(4) On a lot determined by the City Planning and Zoning Commission after public notice and hearing to be so located that such building will in the judgment of the City Planning and Zoning Commission substantially serve the public convenience and welfare, and will not substantially and permanently injure the appropriate use of a neighboring property."

It is conceded that the relator's property does not meet the conditions of any of the first three paragraphs and that the sole question is whether the respondents are required to issue a permit by reason of the provisions of paragraph four.

It is conceded, too, that the zoning ordinance itself is constitutional. But it is insisted that the respondents have applied the provisions of the ordinance in such an arbitrary and unreasonable manner as to violate the guaranties of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Sections 1, 2 and 19 of Article I of the Constitution of Ohio.

Would the use of the relator's property for school purposes "substantially serve the public convenience and welfare, and * * * not substantially and permanently injure the appropriate use of neighboring property"?

The evidence discloses that this residential section of the city is in a U-1, or single family, district, and is improved with well kept homes occupied in most instances by the owners. However, there are several nonconforming uses. These consist of a two-story, four-suite apartment and one or two two-family houses, all of which were constructed before the zoning ordinance was adopted in the year 1921. Likewise, on the northwest corner of Superior and Hampshire roads is an old church—a frame building—which was erected previous to the adoption of the zoning ordinance. But there is no evidence that there has been a failure to maintain the character of the district since the ordinance became effective.

At the hearing before the planning commission it was stated on behalf of the relator that not more than 25 students were expected to attend the school. However, the record discloses testimony by one of the relator's witnesses that

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the house would accommodate 75 to 100 students. Another of the relator's witnesses testified that the house could accommodate 125 to 150 students.

Furthermore, there is testimony that the use of the relator's property for school purposes would substantially and permanently injure the appropriate use of the neighboring property and lower its value.

The relator relies upon the decision of this court in the case of State, ex rel. Synod of Ohio of United Lutheran Church, *v.* Joseph, et al., Village Comm., 139 Ohio St., 229, 39 N. E. (2d), 515, 138 A. L. R., 1274. However, a study of the particular facts in that case discloses a marked contrast with those in the instant controversy. Reduced to its lowest terms, the decision in that case was based upon the extremely important and unusual fact that the relator had been misled by the zoning and village commissions of the village of Upper Arlington. The relator had applied twice for a permit to build a church. Each application involved a different site. The respondents denied both requests. Thereafter the respondents passed a resolution stating that certain other sites would be available for church purposes and that if an application were made for a permit to build on one of them, it would be granted. The relator accepted the respondents' suggestion in good faith and purchased one of the recommended sites. Then an application was made for a building permit. But it, too, was denied. The relator then sought a writ of mandamus to compel the issuance of the permit on the ground that the refusal was "unreasonable, arbitrary, unwarranted, confiscatory and a restraint upon the freedom of worship." The Court of Appeals properly allowed the writ, and the judgment was affirmed by this court.

There is no such circumstance in the instant case. This relator purchased the residence property on its own initiative and without suggestion or representation of any sort by the respondents. Furthermore, it is not contended that there is no available school site in convenient adjacent zones.

The record discloses no evidence of an abuse of dis-

cretion by the respondents in refusing to issue a permit to the relator to use its residence property for school purposes. To entitle the relator to a writ of mandamus the evidence must show a refusal to perform "an act which the law specially enjoins as a duty resulting from an office, trust, or station." Section 12283, General Code.

The judgment of the Court of Appeals is reversed and final judgment is rendered for the respondents.

Judgment reversed.

Turner, Matthias, Hart and Stewart, JJ., Concur.
Zimmerman and Sohngen, JJ., Dissent.

ZIMMERMAN, *J.*, dissenting:

Applying to the instant case the principles announced and approved by this court in State, ex rel. Synod of Ohio of United Lutheran Church, *v.* Joseph, et al., Village Comm., 139 Ohio St., 229, 39 N. E. (2d), 515, 138 A. L. R., 1274, and upon authority of the cases cited and relied on in that case, the judgment of the Court of Appeals herein should be affirmed.

In 1940 the Russell Sage Foundation published a book by Edward M. Bassett entitled "Zoning," in which the author traces the history and development of the law of zoning in the United States. At page 70 of the text the following comment is made:

"When in 1916 the framers of the Greater New York building zone resolution were discussing what buildings and uses should be excluded from residence districts, it did not occur to them that there was the remotest possibility that churches, schools and hospitals could properly be excluded from any districts. They considered that these concomitants of civilized residential life had a proper place in the best and most open localities."

In my opinion, residential communities which are too sensitive to welcome such cultural, educational and character-building institutions as churches and schools should

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protect themselves by private restrictions rather than by resort to zoning ordinances.

Of course the power of municipalities to establish zones is a police power, and police power is the public right of reasonable regulation for the common good, which may not be extended arbitrarily beyond that purpose.

Hence, zoning ordinances restricting the use of property to be valid and enforceable must bear a substantial relation to the health, safety, morals or general welfare of the community. City of Youngstown *v.* Kahn Bros. Bldg. Co., 112 Ohio, St., 654, 148 N. E., 842, 43 A. L. R., 662; Women's Kansas City St. Andrew Soc. *v.* Kansas City, Mo. (C. C. A. 8), 58 F. (2d), 593.

A zoning ordinance of the character now before us, by which a school is excluded from a residential district of a designated kind, is applied in an unreasonable, arbitrary and discriminatory way, where under the particular facts it does not appear that the exclusion of a school from such a district has any substantial relation to the *health, safety, morals or general welfare* of the community. City of Sherman *v.* Simms, 143 Tex., 115, 183 S. W. (2d), 415.

Although in the instant controversy a number of witnesses, mostly property owners in the immediate neighborhood, testified that in their opinion the establishment of relator's school would reduce the value of surrounding real estate and would result in noise and confusion, I can find no tangible evidence in the record indicating that the presence of the school would adversely affect the health, safety, morals or general welfare of the residents of the district.

The testimony and photographs attached to the bill of exceptions as exhibits represent relator's property in Cleveland Heights as consisting of a large house in spacious grounds with a sizable garage in the rear of the house and with a stone wall partially surrounding the premises.

As I view the matter, the planning commission of the city of Cleveland Heights acted unreasonably, arbitrarily and in a discriminatory manner in denying relator the use of its property in issue for a parochial school of modest size,

especially in face of the fact that schools had been allowed in other zones of the municipality of the same classification as the one involved here.

Upon the record and under the authorities, the Court of Appeals was justified in rendering the judgment it did and I can discover no good reason for disturbing such judgment.

Sohngen, J., concurs in the foregoing dissenting opinion.

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